NIK RAHIMI WAN HASSAN & ANOR v. NIK RAHMAT WAN HASSAN

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
AZIAH ALI JCA
MOHTARUDIN BAKI JCA
[CIVIL APPEAL NO: W-02-431-02-2012]
9 JANUARY 2015

TRUSTS: *Void trust – Validity – Allegation that deceased had created trust over property for granddaughter – Plaintiff appointed as trustee and attorney – Plaintiff claimed for property in capacities as trustee and attorney in High Court – Claim challenged by defendants – Whether instruments in creation of trust and power attorney valid – Whether contents of documents consistent – Whether property ought to be distributed by way of faraid*

According to the respondent ('the plaintiff'), his late mother ('the deceased') had created a trust over a bungalow house ('the property') in favour of the plaintiff's daughter ('Nik Afrina'); and that by that trust instruments, had appointed the plaintiff as the trustee and attorney for Nik Afrina. In his capacities as the trustee and attorney for Nik Afrina, the plaintiff filed a claim for the property in the High Court and submitted that the trust ('exh. P1') and power of attorney ('POA'/'exh. P2') were created through the execution of two instruments by the deceased. In objecting the claim, the appellants ('the defendants') argued that exhs. P1 and P2 were invalid because the contents were confusing and conflicting and therefore, the documents were flawed and defective. In para. 1 of exh. P1, the deceased appeared to have created a trust in respect of the property and appointed herself to be the trustee for the benefit of Nik Afrina. However, in para. 2, she appointed the plaintiff as her attorney under an irrevocable POA, the consideration being for natural love and affection. It was the defendants' case that after the execution of exhs. P1 and P2, the deceased had directed a solicitor to prepare an irrevocable POA ('exh. D28'), appointing the third defendant to deal with the property and to nullify exhs. P1 and P2. The deceased died six months later. The plaintiff contended that, in the light of the state of health of the deceased at the material time, exh. D28 could not have been voluntarily made by the latter. The defendants counterclaimed that (i) exh. D28 given to the first appellant ('the third defendant') overrode exhs. P1 and P2; and sought (ii) a declaration that the property be distributed in accordance with *faraid*. The High Court allowed the plaintiff's claim and dismissed the defendants' counterclaim. Hence, the present appeal.

Held (allowing appeal in part; setting aside order of High Court)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) Exhibits P1 and P2 were flawed and defective. The contents were confusing and contradictory of each other. These two instruments were void by reason of uncertainty as to their intention. It was not clear as to what the deceased wanted to create by these two instruments; a trust or a POA or both; and if what was intended was to create a trust; who was supposed to be the trustee. (para 15)

(2) The plaintiff had no *locus standi* to bring the action on behalf of Nik Afrina. If at all exh. P1 created a POA, the donor was the deceased while the donee was the plaintiff, meaning that the plaintiff was an attorney for the deceased and not the attorney for Nik Afrina. The trustee for Nik Afrina was the deceased. The POA in exh. P1 ceased to be in force with the death of the deceased. Under s. 26(a) of the Contracts Act 1950, natural love and affection does not constitute consideration. An agreement without a consideration is void. (paras 19, 20, 24, 27-29)

(3) Like exh. P1, exh. P2 was not just a trust instrument but was also the POA of the property. Just like exh. P1, the donor of the POA was still the deceased and the donee was the plaintiff. Exhibit P2 made an express reference to exh. P1, making it clear that exh. P1 shall prevail over exh. P2 should there be any contradiction between these two instruments. (para 32)

(4) If exh. P2 was a trust instrument appointing the plaintiff as a trustee for the benefit of Nik Afrina in respect of the property, then exh. P2 contradicted exh. P1 since under exh. P1, the deceased, and not the plaintiff, was the trustee for Nik Afrina. Since it was provided in exh. P2 that in the event that exh. P2 contradicted exh. P1, exh. P1 would prevail, exh. P2 did not make the plaintiff the trustee for Nik Afrina. Thus, exh. P2 did not confer any *locus standi* on the plaintiff to bring this action as the 'trustee' or 'attorney' of Nik Afrina. (paras 34 & 35)

(5) It had not been satisfactorily established that the deceased was mentally fit to execute exh. D28 and therefore, the defendants failed to establish that exh. D28 was a valid POA. The property was to be distributed in accordance with *faraid*. (paras 42 & 43)

Bahasa Malaysia Translation

Menurut responden ('plaintif'), arwah ibunya ('si mati') telah membuat satu amanah ke atas sebuah rumah banglo ('hartanah tersebut') buat anak perempuan plaintif ('Nik Afrina'); dan bahawa melalui instrumen-instrumen amanah tersebut, telah melantik plaintif sebagai pemegang amanah dan wakil

kuasa bagi Nik Afrina. Dalam kapasitinya sebagai pemegang amanah dan wakil kuasa bagi Nik Afrina, plaintif memfailkan tuntutan ke atas hartanah tersebut di Mahkamah Tinggi dan menghujahkan bahawa amanah tersebut ('eks. P1') dan surat kuasa wakil ('POA'/'eks. P2') dibuat melalui pelaksanaan dua instrumen oleh si mati. Dalam membantah tuntutan tersebut, perayu-perayu ('defendan-defendan') menghujahkan bahawa eks. P1 dan P2 adalah tidak sah kerana kandungan kedua-duanya mengelirukan serta saling bercanggah dan dengan itu, dokumen-dokumen tersebut cacat. Dalam perenggan 1 eks. P1, si mati kelihatan membuat amanah ke atas hartanah dan melantik dirinya sebagai pemegang amanah bagi manfaat Nik Afrina. Walau bagaimanapun, dalam perenggan 2, dia melantik plaintif sebagai wakil kuasanya di bawah POA yang tidak boleh dibatalkan, dengan kasih sayang semulajadi sebagai balasan. Adalah menjadi kes defendan-defendan bahawa selepas pelaksanaan eks. P1 dan P2, si mati telah mengarahkan peguamcara untuk menyediakan eks. D28, melantik defendan ketiga untuk menguruskan hartanah tersebut dan membatalkan eks. P1 dan P2. Si mati meninggal dunia enam bulan kemudian. Plaintif menghujahkan bahawa, melihatkan pada keadaan kesihatan si mati pada masa material, eks. D28 tidak mungkin dibuat secara sukarela olehnya. Defendan menuntut balas bahawa (i) eks. D28 yang diberikan kepada perayu pertama ('defendan ketiga') mengatasi eks. P1 dan P2; dan memohon (ii) satu deklarasi bahawa hartanah tersebut dibahagikan menurut *faraid*. Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Oleh itu, rayuan ini.

Diputuskan (membenarkan sebahagian rayuan; mengenepikan perintah Mahkamah Tinggi)

Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Ekshibit P1 dan P2 adalah cacat. Kandungan kedua-duanya mengelirukan dan bercanggah antara satu sama lain. Kedua-dua instrumen adalah tidak sah atas alasan ketidakpastian pada niatnya. Adalah tidak jelas apa yang si mati mahukan dengan kedua-dua instrumen ini; satu amanah atau satu POA atau kedua-duanya; dan jika apa yang diniatkan adalah untuk membuat amanah; siapa yang sepatutnya menjadi pemegang amanah.

(2) Plaintif tidak mempunyai *locus standi* untuk membawa tindakan ini bagi pihak Nik Afrina. Sekiranya eks. P1 membentuk satu POA, pemberinya adalah si mati manakala penerimanya adalah plaintif, bermaksud bahawa plaintif adalah wakil kuasa bagi si mati dan bukan wakil kuasa bagi Nik Afrina. Pemegang amanah Nik Afrina ialah si mati. POA dalam eks. P1 tamat daripada berkuatkuasa dengan kematian si mati. Di bawah s. 26(a) Akta Kontrak 1950, kasih sayang semulajadi tidak membentuk balasan. Satu perjanjian tanpa balasan adalah tidak sah.

(3) Seperti eks. P1, eks. P2 bukan sekadar instrumen amanah tetapi juga merupakan POA hartanah. Seperti juga eks. P1, pemberi POA masih si mati dan penerima adalah plaintif. Ekshibit P2 membuat rujukan nyata kepada eks. P1, menjadikan ia jelas bahawa eks. P1 mengatasi eks. P2 jika terdapat percanggahan antara kedua-dua instrumen.

(4) Sekiranya eks. P2 adalah instrumen amanah yang melantik plaintif sebagai pemegang amanah bagi manfaat Nik Afrina bagi hartanah, si mati, dan bukan plaintif, adalah pemegang amanah bagi Nik Afrina. Oleh kerana diperuntukkan dalam eks. P2 bahawa jika eks. P2 bercanggah dengan eks. P1, eks. P1 akan mengatasinya, eks. P2 tidak menjadikan plaintif pemegang amanah bagi Nik Afrina. Oleh itu, eks. P2 tidak memberikan *locus standi* kepada plaintif untuk membawa tindakan ini sebagai 'pemegang amanah' atau 'wakil kuasa' bagi Nik Afrina.

(5) Adalah tidak terbukti secukupnya bahawa si mati sihat secara mental untuk melaksanakan eks. D28 dan dengan itu, defendan-defendan gagal membuktikan bahawa eks. D28 adalah POA yang sah. Hartanah tersebut hendaklah dibahagikan secara *faraid*.

Case(s) referred to:

Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1975] 1 LNS 95 HC ***(refd)***

Tang Meng Hock v. Tang Ming Seng [2010] 1 CLJ 208 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 26(a)
Powers of Attorney Act 1949, ss. 5, 6(a)

For the appellants - Veronica Steven; M/s Veronica & Co
For the respondent - Wan Rohimi Wan Daud (Mohd Faizi Che Abu with him); M/s Tengku Amalin' A-Ishah Putri, Faizi & Wan Rohimi

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-22(24)-2634(A)-2007 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Mohd Hishamudin Yunus JCA:

[1] This appeal is against the decision of the High Court of Kuala Lumpur (Civil Division) dated 25 January 2012.

[2] At the High Court the respondent's claim was allowed, and the appellants' counter claim was dismissed.

[3] The appellants were two of the four defendants at the High Court, whilst the respondent was the plaintiff.

[4] On 11 February 2014 we have unanimously allowed the appeal in part. A

[5] We now give our grounds.

[6] The High Court had allowed the respondent's (plaintiff's) prayers for, among others, a declaration that two instruments creating a trust called:

(a) Deklarasi Amanah Dan Surat Kuasa Wakil dated 23 June 2006 (exh. P1); and B

(b) Trust Declaration & Power of Attorney dated 27 June 2006 (exh. P2),

In respect of an immovable property situated in Kuala Lumpur, namely, a double storey bungalow house in Bukit Pantai, registered in the name of one C Nik Zainab binti Haji Nik Majid, are valid as trust instruments and powers of attorney; that these trust instruments appoint the plaintiff as the trustee and attorney for the beneficiary; and that the beneficiary under the trust is one Nik Afrina binti Nik Rahmat.

[7] The present appeal concerns a dispute between siblings over a piece D of property - a bungalow house at Bukit Pantai, in Kuala Lumpur ('the disputed property'). A half-share in this disputed property belonged to the late Nik Zainab binti Hj Nik Majid - the mother of the parties (that is to say, the mother of the appellants/defendants and the respondent/plaintiff). What is in dispute is this half share of the late Nik Zainab. E

(The other half-share in the property belonged to one Ruhinda binti Haji Mohamed - but for the purpose of this appeal, we are not concerned with this other half-share.)

The Plaintiff's Case F

[8] It is the contention of the plaintiff, Nik Rahmat, that his late mother, Nik Zainab (who was also the mother of all the other siblings, the defendants), whilst alive, had created a trust over the disputed property in favour of her granddaughter, Nik Afrina (the daughter of the plaintiff), who was three years of age then; and that, by that trust instruments, had appointed G the plaintiff, the father of Nik Afrina, the trustee as well as the attorney for Nik Afrina. The plaintiff claims that the trust and power of attorney were created through the execution of two instruments by his late mother, Nik Zainab, during her lifetime, namely, exh. P1 and exh. P2.

[9] At the time when the alleged trust instruments (exh. P1 and exh. P2) H were executed the late Nik Zainab lived with the plaintiff, the plaintiff's wife, their daughter, Nik Afrina, and the fourth defendant, Nik Rashidah binti Wan Hassan, in the disputed property at Bukit Pantai, Kuala Lumpur.

I

[10] Exh. P2 states:

TRUST DECLARATION & POWER OF ATTORNEY

Dated This 27 Day of June 2006

BETWEEN

NIK ZAINAB BINTI NIK MAJID
THE DONOR/GRANTOR

AND

NIK RAHMAT BIN WAN HASSAN
THE DONEE/TRUSTEE

IN FAVOUR OF

NIK AFRINA BINTI NIK RAHMAT
THE BENEFICIARY

POWER OF ATTORNEY

KNOWN ALL MEN BY THESE PRESENTS that I,

NIK ZAINAB BINTI NIK MAJID (NRIC NO: 291231-03-5490*/2637551) of No. 9, Jalan Turi, Bukit Pantai, 59100 Kuala Lumpur, Wilayah Persekutuan in my personal capacity and as the registered owner of 1/2 share (1/2 Bahagian) of the properties known as GRN 7767, Lot No. 40554, Mukim Kuala Lumpur bearing a postal address similar to my residential address as stated above do hereby nominate and appoint my son;

NIK RAHMAT BIN WAN HASSAN (NRIC NO: 580903-03-5037/5504582) also of No. 9, Jalan Turi, Bukit Pantai, 59100 Kuala Lumpur, Wilayah Persekutuan;

To be my ATTORNEY for and in my name otherwise to do all or any of the following things and acts within Malaysia as a Trustee in respect of my 1/2 share of the property known as GRN 7767, Lot No. 40554, Mukim Kuala Lumpur (hereinafter called the said 'Property') held ON Trust on behalf of my beneficiary Granddaughter NIK AFRINA BINTI NIK RAHMAT (BIRTH CERTIFCATE NO: BF 44307/NRIC NO: 031104-03-1154) until she attains the age of majority.

This Power of Attorney is given in favour of my above named son to protect my above named Granddaughter's interest and rights in the 1/2 share of the said property until such time she attains the age of majority whereby my 1/2 share in the said property shall be transferred to her by my Attorney. This Power of Attorney shall be read and construed in accordance with and subject to the Syariah Court Trust Declaration and Power of Attorney named 'DEKLARASI AMANAH DAN SURAT KUASA WAKIL' which is executed simultaneously for the purpose of the gift of the said property to my Granddaughter.

In the event of a contradiction between both the aforesaid instruments the said 'DEKLARASI AMANAH DAN SURAT KUASA WAKIL' shall prevail and any such contradiction shall be given a sensible and reasonable construction in favour of my Beneficiary Granddaughter's interest.

1. To demand, sue for, defend in court ...

[11] Nik Zainab died on 22 June 2007.

The Defendants' Case

[12] The defendants contend that neither exh. P1 nor exh. P2 is valid on two grounds, namely:

(a) that the two documents are flawed and defective; and

(b) that the two instruments were fraudulently obtained.

[13] We begin by inquiring into the issue as to whether exh. P1 and exh. P2 are flawed and defective.

[14] It is the defendants' contention that exh. P1 and exh. P2 are flawed and defective by reason of the fact that their contents are conflicting and confusing.

The Findings Of This Court With Respect To The Plaintiff's Claim

[15] With respect, we accept the defendants' submission that exh. P1 and exh. P2 are flawed and defective. We have closely examined the contents of exh. P1 and exh. P2 and we find that the contents are indeed confusing, and we are uncertain as to the intention of the late Nik Zainab. What is it that she wanted to create by these two instruments: a trust or a power of attorney? Or both? If what is intended is to create a trust, who is supposed to be the trustee? The late Nik Zainab or the plaintiff? We find that exh. P1 and exh. P2 contradict each other thereby making it uncertain as to the intention of the late Nik Zainab. Thus these two instruments are void by reason of uncertainty as to their intention.

[16] However, assuming that exh. P1 and exh. P2 are valid, we proceed to make the following observations and conclusions.

[17] In exh. P1, in para. 1, the late Nik Zainab appears to have created a trust in respect of the disputed property and appointed herself to be the trustee for the benefit of her granddaughter, Nik Afrina.

[18] At the same time, however, in para. 2 of exh. P1, she appointed the plaintiff as her attorney under an irrevocable power of attorney, the consideration being for natural love and affection. Under the power of attorney, the plaintiff is given the power:

... untuk melaksanakan semua dokumen dan untuk membuat perkara-perkara yang perlu bagi menyebabkan Hartanah tersebut dipindah milik kepada dan didaftarkan di atas nama Benefisiari atau menyebabkan Hartanah tersebut diuruskan mengikut kehendak atau arahan Benefisiari ...

[19] It is pertinent to note that if at all exh. P1 created a trust, the trustee is Nik Zainab herself, and not the plaintiff.

[20] And if at all exh. P1 created a power of attorney, the donor is Nik Zainab, and the donee, the plaintiff; meaning that the plaintiff is an attorney for Nik Zainab and not an attorney of his infant daughter, Nik Afrina.

[21] It is important for us to highlight these facts because in the present suit the plaintiff, based on the title of the action, is bringing the action in the following capacity:

> (sebagai pemegang amanah dan wakil kuasa untuk dan bagi pihak Nik Afrina Binti Nik Rahmat)

[22] Based on the title of the action, the plaintiff is bringing the action in two capacities:

(a) As the trustee for Nik Afrina; and

(b) As the attorney of Nik Afrina.

[23] One thing is clear though: the plaintiff is not bringing the action as the attorney or in the name of the late Nik Zainab; nor is the plaintiff bringing this action in his capacity as the next friend of the minor, Nik Afrina.

[24] Now, based on exh. P1, the plaintiff is neither the trustee for, nor the attorney of, Nik Afrina. The trustee for Nik Afrina is her grandmother, the late Nik Zainab; and the plaintiff is not the attorney of Nik Afrina: he is the attorney of the late Nik Zainab.

[25] That this is the legal position as far as exh. P1 is concerned, appears to be conceded by the plaintiff in para. 14 of the statement of claim. This paragraph states:

> 14. Melalui Dokumen Pertama (Exh. P1) tersebut Ibu tersebut telah *inter alia*:
>
> (a) mengistiharkan dirinya sebagai Pemegang Amanah dan bahawa dia memegang 1/2 Bahagian Hartanah tersebut kepunyaannya bagi pihak Anak Plaintif tersebut juga dinyatakan sebagai seorang benefisiari;
>
> (b) mengistiharkan bahawa di atas balasan kasih sayang (in consideration of natural love and affection) Surat Kuasa Wakil ini tidak boleh dibatalkan (irrevocable); dan
>
> (c) melantik Plaintif sebagai wakil kuasa (attorney) untuk:
>
> (i) melaksanakan semua dokumen-dokumen dan membuat apa yang perlu memindah milik 1/2 Bahagian Hartanah tersebut kepunyaannya dan didaftarkan di atas nama Anak Plaintif tersebut; atau

(ii) menyebabkan 1/2 Bahagian Hartanah tersebut kepunyaannya diuruskan mengikut kehendak atau arahan Anak Plaintif tersebut.

[26] We wish to pause and state here that we accept the contention of the defendants that with the death of Nik Zainab on 22 June 2007 the power of attorney in exh. P1 ceased to be in force (see s. 5 of the Powers of Attorney Act 1949). However, it is contended by the learned counsel for the plaintiff that the power of attorney continued to be in force notwithstanding the death of Nik Zainab by reason of s. 6(1)(a) of the Powers of Attorney Act 1949 since the power of attorney was given for valuable consideration, and that natural love and affection do, in law, constitute valuable consideration, citing *Tang Meng Hock v. Tang Ming Seng* [2010] 1 CLJ 208 where, at para. [20] of the judgment of the Court of Appeal, Low Hop Bing JCA said:

[20] It is an established principle that natural love and affection is good and valid consideration in law. This is all too well-known in land and conveyancing law and practice.

[27] With respect, the above *dicta* is *per incuriam*. In our judgment it is clear from s. 26(a) of the Contracts Act 1950 that 'natural love and affection' does not constitute consideration. Let us examine s. 26(a). It provides:

26. Agreement made without consideration, void, unless:

An agreement made without consideration is void, unless:

(a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

[28] The general rule under our law of contract as provided for by s. 26 is that an agreement made without consideration is void. But para. (a) of the above s. 26 provides one of the exceptions to the general rule in a situation where the agreement is made on account of natural love and affection between parties standing in a near relation to each other. Thus para. (a) above provides for an exception in a case of natural love and affection; it does not say that natural love and affection constitute consideration. Hashim Yeop Sani J (as he then was) understood that paragraph to be an exception to the general rule when he said in *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1975] 1 LNS 93; [1976] 2 MLJ 177 (at p. 181 (MLJ)):

An agreement without consideration is void unless it comes under one of the exceptions in s. 26 of our Contracts Act 1950. (emphasis added)

[29] Thus, based on exh. P1 alone the plaintiff has no *locus standi* to bring the action on behalf of Nik Afrina.

[30] We now move on to exh. P2. Earlier in this judgment we have set out the essential provisions of exh. P2. According to the plaintiff in his statement of claim (see para. 15 of the statement of claim), unlike exh. P1, exh. P2

creates a trust in relation to the disputed property for the benefit of Nik Afrina, appointing the plaintiff as trustee of the trust. And, apart from that, exh. P2 also creates an irrevocable power of attorney (for valuable consideration) appointing the plaintiff as the attorney of the late Nik Zainab.

[31] Paragraph 15 of the statement of claim states:

> 15. Melalui Dokumen Ke-2 [Exh. P2] tersebut Ibu tersebut telah menguatkan dan menjelaskan dengan lebih lanjut dan terperinci kuasa-kuasa yang terkandung di dalam Dokumen Pertama [Exh. P1] tersebut dan melantik Plaintif sebagai Pemegang Amanah (Trustee). Dokumen Ke-2 [Exh. P2] tersebut hendaklah dibaca bersama dengan Dokumen Pertama [Exh. P1]tersebut demi menjaga kepentingan Anak Plaintif tersebut yang masih belum cukup umur di dalam 1/2 Bahagian Hartanah tersebut.

[32] We find that this document (exh. P2) creates a trust appointing the plaintiff as the trustee in respect of the disputed property and Nik Afrina as the beneficiary. Like exh. P1, exh. P2 is not just a trust instrument but is also a power of attorney in respect of the disputed property. Just like exh. P1, the donor of the power of attorney is still the late Nik Zainab, and the donee is the plaintiff. But, unlike exh. P1, the provisions of the power of attorney in exh. P2 appear to be extensive. For example, cl. 10 of exh. P2 allows the plaintiff to sell the disputed property (there is no such power in exh. P1); and exh. P2 gives power to the plaintiff to manage all the deceased's properties including but not limited to institute and defend actions and to recover properties. There is no such power in exh. P1; and exh. P1 is confined only to the disputed property and does not concern the other properties of the late Nik Zainab.

[33] It is significant to note that exh. P2 makes an express reference to exh. P1 making it clear that exh. P1 shall prevail over exh. P2 should there be any contradiction between these two instruments. It is to be recalled that exh. P2 states:

> In the event of a contradiction between both the aforesaid instruments the said 'DEKLARASI AMANAH DAN SURAT KUASA WAKIL' shall prevail and any such contradiction shall be given a sensible and reasonable construction in favour of my Beneficiary Granddaughter's interest.

[34] If exh. P2 is a trust instrument appointing the plaintiff as a trustee for the benefit of Nik Afrina in respect of the disputed property, then, exh. P2 contradicts exh. P1; since under exh. P1 the late Nik Zainab is the trustee for Nik Afrina and not the plaintiff. And since it is provided in exh. P2 that in the event that exh. P2 contradicts exh. P1 the latter (that is, exh. P1) prevails, therefore, the provision of exh. P1 appointing the late Nik Zainab as the trustee of the trust for Nik Afrina prevails, meaning that exh. P2 does not make Nik Rahmat, the plaintiff, the trustee for Nik Afrina. At best exh. P2 is merely an irrevocable power of attorney appointing the plaintiff

as the attorney for the late Nik Zainab. This means that exh. P2 does not support the plaintiff's contention that exh. P2 creates a trust instrument appointing the plaintiff as the trustee for the benefit of Nik Afrina.

[35] Thus, exh. P2 also does not confer any *locus standi* on the plaintiff to bring this action as 'trustee' or 'attorney' of Nik Afrina.

The defendants' Counter Claim

[36] The defendants' counter claim alleges:

(a) That exh. P1 and exh. P2 were fraudulently obtained by the plaintiff; and

(b) That the power of attorney (exh. D28) given to the first appellant/third defendant (Nik Rahimi) overrides exh. P1 and exh. P2.

[37] It is the defendants' case that the late Nik Zainab, some six months after the execution of exh. P1 and exh. P2, had directed a solicitor, one Ms San Yuen Ping (DW2), to prepare an irrevocable power of attorney (exh. D28) appointing her daughter, Nik Rahimi (the first appellant/third defendant), to deal with the disputed property, and to nullify exh. P1 and exh. P2. Exh. D28 was executed by the late Nik Zainab in the house of the first appellant/third defendant (Nik Rahimi) on 15 December 2006; and it is claimed that the contents of exh. D28 was duly explained to the late Nik Zainab by the said Ms San Yuen Ping.

[38] The late Nik Zainab died some six months later.

[39] The plaintiff contends that, in the light of the state of health of the late Nik Zainab at the material time, exh. D28 could not have been voluntarily made by the late Nik Zainab.

[40] The learned trial judge made the following finding:

> Mengenai D28 (Dokumen 3), dari keterangan yang dikemukakan menunjukkan yang D28 dilaksanakan oleh Nik Zainab dalam keadaan yang beliau terlantar sakit. Defendan-Defendan melalui tindakan mereka telah membawa seseorang yang munasabah, iaitu, SD2 untuk Mahkamah mempercayai yang mereka tidak mempergunakan keadaan kesihatan Nik Zainab untuk laksanakan D28.
>
> Selanjutnya boleh dibuat inferens oleh Mahkamah dari fakta yang tidak dipertikaikan yang kesihatan Nik Zainab begitu lemah pada masa pelaksanaan dan sebelum pelaksanaan D28.
>
> D28 menunjukkan yang Defendan-Defendan telah mengambil tindakan seolah-olah Nik Zainab yang secara sukarela melaksanakan D28. Setelah penelitian keterangan yang dikemukakan, Nik Zainab pada ketika itu berada dalam kesihatan yang sangat lemah dan terlantar di katil, saya dapati beliau tidak berada di dalam keadaan kesihatan dan mental yang stabil membolehkan beliau melaksanakan secara sukarela.

A …

D28, saya dapati tidak membatalkan P1 dan P2. D28 dilaksanakan dalam keadaan Nik Zainab tidak berada di dalam mental yang boleh melaksanakan D28 secara sukarela. D28 dengan itu adalah tidak sah.

B **Our Findings On The Counter claim**

[41] In our judgment, based on the evidence, we agree with the finding of the learned trial judge that the defendants had failed to establish fraud in respect of the execution of exh. P1 and exh. P2 by the late Nik Zainab. However, in the light of the view that we have expressed above that exh. P1 C and exh. P2 are not valid by reason of being a confusing and unclear documents and that (assuming the two instruments are valid) the plaintiff has no *locus standi* to bring this action, the issue of whether or not there was fraud has become somewhat academic.

[42] Based on the evidence, we also accept the finding of the learned trial D judge that it had not been satisfactorily established that the late Nik Zainab was mentally fit to execute the power of attorney exh. D28; and, therefore, the defendants had failed to establish that exh. D28 is a valid power of attorney.

Ruling On The Appeal

E

[43] Under the circumstances we allow the appeal, but only partially, in that we set aside the order of the High Court in allowing the plaintiff's claim and totally dismissing the defendants' counter claim. Instead, on our part, we are only allowing prayer (d) of the defendants' counter claim (a declaration that the disputed property be distributed in accordance with faraid); and F nothing more. (Each party to bear own costs.)

Appeal allowed in part ie, the disputed property be distributed in accordance with *faraid*, the High Court order is set aside, each party to bear own costs.

G

H

I